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No. 02-649

IN THE
Supreme Court of the United States

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,
Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

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OVERVIEW

This Overview sets the context for Petitioners' responses to the Opposition of Respondents, which follow.

The fundamental error of the decision below – and of the Respondents' Brief in Opposition supporting it – is a failure to appreciate that the extraterritorial application of United States law is the exception, and not the rule. When, as here, personal jurisdiction is uncontested, Pet. App. 5a, and the undisputed facts establish subject matter jurisdiction, a district court *must* exercise jurisdiction over the defendants and the claims. *See e.g., Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

The jury found that the Respondents (one of which is a Malaysian corporation registered to do, and which conducts, business in North Carolina), a North Carolina corporation, and others had conspired to fix the prices of extruded rubber thread, which was intended to have a substantial effect on the United States. Pet. App. 7a. Given the undisputed interstate sales of extruded rubber thread, *see, e.g.,* Opp. Br. at 22 ("Here . . .the conspirators allegedly [*sic*] fixed the price of a product sold in the United States."), the district court had subject matter jurisdiction under 28 U.S.C. § 1331 over the Petitioners' Sherman Act claims. *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242-43 (1980) (jurisdiction over Sherman Act claim established by "evidence . . . that the defendants' activity is itself in interstate commerce").

The district court erred by granting defendants judgment when the Petitioners failed to persuade the jury (over their objection to the relevant instructions) of the existence of an element necessary for an *extraterritorial* assertion of Sherman Act jurisdiction – a "substantial effect" on the United States. *Id.* 7a. But resort to extraterritorial

application of Sherman Act jurisdiction was error because the defendants' activities were in interstate commerce and, thus, federal question subject matter jurisdiction over the Petitioners' antitrust claims had been established.[1]

The Fourth Circuit compounded the district court's error by creating a new "primarily foreign or primarily domestic" test and by conjuring up an inquiry "more flexible and subtle," Pet. App. 24a, than the "bright-line" test of *McLain, id.*, for district courts to use in determining subject matter jurisdiction. *Id.* 25a. If the balance of these undefined factors[2] points, like the planchette of an Ouija board, toward a "primarily foreign" conspiracy, then subject matter jurisdiction is established pursuant to the more burdensome extraterritorial standards of *Hartford Fire Insurance Company v. California*, 509 U.S. 764 (1993), and the case it approvingly cited, *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*") – whether or not subject matter jurisdiction could be established under the less burdensome constitutional standards of *McLain*. On this dubious basis, the Fourth Circuit affirmed the district court.

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[1] Subject matter jurisdiction over a Sherman Act claim has a constitutional basis: proof of the defendants' nexus to interstate commerce is required because that legislation was passed pursuant to the Commerce Clause. *McLain*, 444 U.S. at 241. As this Court has recognized an increasingly expansive reach of congressional power pursuant to that clause, the reach of the Sherman Act has expanded "correspondingly." *Id.*; *see also United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 558 (1944) (" That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt.").

[2] *Id.* ("the full range of factors that may appropriately affect the exercise of our antitrust jurisdiction" should be considered).

As explained in the Petition at 22, and as also discussed in the brief submitted by the American Antitrust Institute as *amicus curiae*, the issues presented in the Petition are fundamental to the effective enforcement of antitrust laws against conspiracies that include foreign aspects. Review by this Court is essential to promote uniform enforcement and to correct the growing disarray in the circuits. The outcome of this case – exoneration of domestic companies that sold in interstate commerce a product, the price of which a jury found had been fixed by their conspiracy – speaks louder than any conjecture about future consequences of this error.

REPLY TO RESPONDENTS' ARGUMENTS

Respondents' arguments against Certiorari should be rejected because: (1) as the Fourth Circuit recognized, Petitioners waived neither of the questions they present for review; (2) *Hartford Fire*'s discussion of *Alcoa* did not adopt, mandate, or even suggest the Fourth Circuit's jurisdictional balancing test; and (3) there is a real conflict among the circuits that will affect all mixed U.S.-foreign cartel cases.

I. Petitioners Did Not Waive Any Theory Upon Which Review Is Sought Of The Decision Below.

The decision below would not have issued had Petitioners waived or otherwise failed to preserve the issues decided therein. Petitioners now seek review of the issues explicitly considered and decided by the Fourth Circuit.

Clearly, the first Question Presented in the Petition is squarely raised and addressed in the Fourth Circuit's decision, *see, e.g.*, Pet. App. 3a ("The purchasers appeal, principally contending that the substantial-effect test applies only to 'wholly' foreign conduct, and so does not govern this case because the rubber thread conspiracy resulted in the sale of price-fixed goods directly into the United States."). That

issue was preserved for the Fourth Circuit's (and this Court's) review by Petitioner's timely objections to the jury instructions. *Id.* 7a.

The Fourth Circuit never stated or implied that any principal contentions of the Petitioners had been waived. In one footnote the court stated that the Petitioners had waived the specific argument "that the district court should have applied" a *Hartford Fire* test incorporating a "lesser effects" standard (or a different formulation of the test applicable to the extraterritorial application of the Sherman Act). *Id.* 15a n.5.[3] But Petitioners are not seeking review of this point; rather, they seek review to correct the fundamental error of the Fourth Circuit in permitting district courts discretion to impose the extraterritorial test of *Hartford Fire* after subject matter jurisdiction of a Sherman Act claim had already been established by the defendants' activity in interstate commerce, and in holding that evidence of such interstate sales would fail to satisfy whatever effects test might be applicable.[4]

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[3] Petitioners' Questions Presented include the primary question answered below – whether the effects test is applicable at all, not whether the standard for that test is "substantial" or "some" effect. The Fourth Circuit's comment that the latter issue was waived serves only to confirm that the primary issue had not been waived.

[4] Even accepting *arguendo* Respondents' first waiver argument – that Petitioners' statements initially led the district court towards giving erroneous instructions – those facts do not waive the right to appeal the same instructions when, as here, timely objections have been asserted. C. Wright & A. Miller, 9A *Federal Practice & Procedure* (1995) § 2558 at 471-72 ("if the party recognizes the error into which it has led the court, and seeks to rectify it by objecting to the instruction when it is given, it may have appellate review of the instruction") (citing cases).

The "subject to jury determination" clause of Petitioners' second Question Presented incorporates whether the jurisdictional issue should have been given to the jury in the first instance and whether a jury's erroneous jurisdictional finding is binding on the court. Petitioners preserved this compound question by objecting to the district court's failure to give their proposed jury instructions, Pet. App. 38a, which excluded "substantial effects" issues and instructed that it was undisputed that the products at issue moved in interstate commerce, C.A. 3663. Moreover, under *Alcoa* and as explained in the Areeda treatise, *see* Pet. at 20, once, as here, the jury found a price fixing conspiracy aimed at the United States, the district court could be divested of Sherman Act jurisdiction only because of a complete absence of U.S.-related sales. The Fourth Circuit's conclusion that the jury's "no substantial effect" finding was sustainable by evidence of antidumping and cost pressures was legally irrelevant because such factors go to motive and do not negate the undisputed U.S. sales, which established subject matter jurisdiction. Plaintiffs appealed on these grounds, as well as on the authority of the cases cited in the Petition at 19-22, which hold that a jury's finding of no effect must be reversed whenever, as here, it is legally untenable under the admitted facts, regardless of when or how the Petitioners raised the error. All the cases hold that an untenable finding of no U.S. commerce must be reversed if raised on appeal. The cases cited by Respondents, Opp. at 9-11, do not address these issues or the relationship between related verdicts.

II. The *Hartford Fire* Opinion Does Not Compel Either Of The Fourth Circuit's Holdings

Respondents assert that *Hartford Fire* compelled the Fourth Circuit's holding. Opp. Br. 12-19. Respondents premise their argument on one assertion – rejected even by the court below – that the "situs of the conspiratorial agreements at issue" determines whether subject matter

jurisdiction of a Sherman Act claim is to be established under the constitutional standards of *McLain* or under the extraterritorial standards of *Hartford Fire*. Respondents' argument circularly presumes that *Hartford Fire* applies to the facts of this case – which is, of course, the principal issue for which review is sought in the first instance.

Hartford Fire, of course, did not compel the Fourth Circuit's erroneous holding because it did not formulate a "primarily foreign" test and because subject matter jurisdiction was undisputed when extraterritorial jurisdiction was addressed. 509 U.S. at 784, 795 (with respect to case no. 91-1128, "we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede").[5]

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[5] The Fourth Circuit assumed that because "some of the participants in one of the conspiracies alleged in *Hartford Fire* were entities based in the United States," citing *In re Ins. Antitrust Litig.*, 938 F.2d 919, 922-23, 929 (9th Cir. 1991), Pet. App. 18a, "*Hartford Fire* itself severely undercuts Dee-K's claim that the substantial-effect test applies only to 'wholly' foreign conduct." *Id.* The Fourth Circuit overlooked the fact that *Hartford Fire* involved two separate sets of parties in two consolidated appeals. 509 U.S. at 764. This Court's statement regarding jurisdiction quoted above applied only to the "foreign defendants" who argued "that the principle of international comity requires the District Court to refrain from exercising jurisdiction over certain claims against it," 509 U.S. at 769, and the statement did not apply to the "domestic defendants," *id.*, who were involved in related claims that were the subject of the consolidated appeal in No. 91-1111. Moreover, this Court's statement that the test for extraterritorial application of the Sherman Act was satisfied with respect to these defendants in no way implies that subject matter jurisdiction could not have been established through the interstate activities of their co-conspirators.

Moreover, the terse statement in *Hartford Fire*, which applied to foreign defendants, did not revoke or undermine *McLain's* reaffirmation that subject matter jurisdiction in Sherman Act cases is established upon proof that "the defendants' activity is itself in interstate commerce." 444 U.S. at 242. In this case, the defendants admitted their interstate activities in their answers to the Complaint and proof of their interstate sales was undisputed at trial. Finally, the *Hartford Fire* opinion does not deal with the presumption of substantial effect that *Alcoa* teaches and that the Justice Department and treatises endorse for use when non-minimal U.S. sales are present. *See* Pet. at 11, 16-17.

Respondents assert that because the Fourth Circuit's criterion for employing the extraterritorial test of *Hartford Fire* (that is, "primarily foreign" conspiracies) is compelled by that case, certiorari is not justified. But, as was addressed in our Petition at 14-17 and will be explained in more detail below, both the First and Third Circuits, with the support of the Justice Department, have taken the position that the *Hartford Fire* criterion for imposing extraterritorial jurisdiction is "wholly foreign" conduct, not "primarily foreign" conduct. Respondents' argument supports certiorari by implicitly acknowledging the potential for continued misunderstanding of this Court's intentions in *Hartford Fire*.

Respondents assert that the "jury's fact-bound verdict [of no substantial effect] was not against the weight of the evidence," Opp. at 15, because antidumping duties and/or latex prices accounted for the rubber thread price increases. Respondents' Counter-Statement of the Case, Opp. at 1-6, emphasizes the evidence that Respondents characterize as showing "that Respondents' U.S. prices were not the result of a conspiracy." *Id.* at 6. Even were that characterization to be accepted, the district court would not have been stripped of subject matter jurisdiction. Because the jury found the Respondents to have conspired to fix U.S. prices,

and because their interstate sales were not disputed, subject matter jurisdiction existed for the district court to grant the Petitioners injunctive relief even if the jury held that the conspiracy had failed to achieve its goals:

> If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. . . . Even where there is an inability to prove that concerted activity has resulted in legally cognizable damages, jurisdiction need not be impaired, though such a failure may confine the available remedies to injunctive relief.

McLain, 444 U.S. at 243 (citations omitted).

III. The Fourth Circuit's Holding Conflicts With The Rule Now In Effect In The First And Third Circuits

Respondents attempt to argue that there is no conflict between the decision below and the First and Third Circuit's treatment of subject matter jurisdiction in *United States v. Nippon Paper Industrial Co.*, 109 F.3d 1 (1st Cir. 1997), and *Carpet Group International v. Oriental Rug Importers' Ass'n*, 227 F.3d 62 (3d Cir. 2000). Respondents argue that this case and *Nippon Paper* only involved foreign conduct, and *Carpet Group* involved domestic conduct. Opp. at 19-23. Respondents' quotation of the key passage from *Carpet Group*, however, undermines their argument:

> *McLain* controls when subject matter jurisdiction over domestic conduct is at issue. We reject the defendants' reliance on

> *Hartford Fire*, because it dealt exclusively with the extraterritorial applicability of the Sherman Act to *wholly foreign conduct*.

Carpet Group, 227 F.3d at 75 (*quoted in* Opp. at 21-22) (emphasis added); *also compare Nippon Paper*, 109 F.3d at 9 (*Hartford Fire* permits jurisdiction over "wholly foreign conduct") *with* Pet. App. 17a (suggesting "wholly foreign conduct" was "shorthand" and dicta).

Because the Respondents conceded their interstate activities, and because those interstate activities are the only predicate for subject matter jurisdiction, *McLain*, 444 U.S. at 242, they have, in effect, conceded that the Fourth Circuit is in conflict with *Carpet Group*. *Carpet Group* acknowledged that *Hartford Fire* applies to an extraterritorial application of the Sherman Act – something that is not required here, because subject matter jurisdiction over Petitioners' claims was established when the Respondents' import and interstate sales activities was undisputed.

In any event, the Third Circuit's discussion of the Justice Department's *amicus* brief demonstrates its agreement with the government's reading of *Hartford Fire* and disagreement with the position of the Fourth Circuit. *Carpet Group*, 227 F.3d at 73. Future cases presenting this issue that arise in the Fourth or Third Circuit are likely to come out differently unless this Court resolves the split among the circuits.

CONCLUSION

Regardless of the rhetoric or debate about evidence, the two reasons for review presented here remain simple, fundamental and important. The first reason for review is that the Third and First Circuits have ruled that the *Hartford Fire/Alcoa* substantial effect on U.S. commerce test is a necessary burden for antitrust plaintiffs only when all the

significant conduct occurs abroad, while the Fourth Circuit has ruled that such burden must be met whenever the offshore conduct is greater than that which occurs onshore. Clearly, the treatises and weight of academic authority agree with the Third and First Circuits, *see* Pet. at 11-20.

The second reason is that, although numerous decisions hold that a substantial effect on U.S. commerce test when appropriate is met with proof of a price fix, intent to affect U.S. commerce, and non-minimal imports or interstate sales, the Fourth Circuit holds that substantiality is a jury question and that a negative finding despite undisputed imports and interstate sales can be justified because the jury may compare the effect of the price fix to the effects of other factors on price. *McLain,* the Areeda treatise, the Government's international antitrust guidelines, and numerous other authorities agree with the position opposite that of the Fourth Circuit.

For the foregoing reason and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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